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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**
12

13 DRK PHOTO, a sole proprietorship,

14 Plaintiff,

15 v.

16 PEARSON EDUCATION, INC.
and JOHN DOE PRINTERS 1-10,

17
18 Defendants.
19

No.

COMPLAINT

(Jury Trial Demanded)

20 Plaintiff DRK Photo (“DRK”) for its Complaint against Defendants Pearson
21 Education, Inc. (“Pearson”) and John Doe Printers 1-10 alleges:

22 **STATEMENT OF ACTION**

23 1. This is an action for copyright infringement and fraud brought by DRK, the
24 holder of all copyrights to the photographs described hereafter and originally licensed for
25 limited use by Pearson, against Defendants for uses of DRK’s photographs without its
26 authority or permission.

PARTIES

2. DRK is a Sedona, Arizona, stock photography agency engaged in licensing photographic images to publishers, including Pearson. DRK is a sole proprietorship owned and operated since 1981 by Daniel R. Krasemann, a United States citizen and a resident of Sedona.

3. Pearson is a Delaware corporation and publisher of educational textbooks. Pearson sells and distributes textbooks via its employees and agents in Arizona and throughout the United States, including the publications in suit and ancillary materials, in which DRK's photographs are unlawfully reproduced. At all times pertinent to the allegations herein, Pearson acted through its various imprints and divisions, as identified in Exhibit A (divided into A-1, A-2 and A-3 due to file size).

4. John Doe Printers 1-10 are the printers of some or all of the publications in suit and ancillary materials, whose identities are known to Pearson but unknown to DRK.

JURISDICTION AND VENUE

5. This is an action for injunctive relief, statutory damages, monetary damages, punitive damages and interest under the copyright laws of the United States and Arizona common law.

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 (federal question), 1338 (copyright) and 1367 (supplemental jurisdiction).

7. Venue is appropriate in this District pursuant to 28 U.S.C. §§ 1391(a) and (b) and 28 U.S.C. §§ 1400(a).

FACTS COMMON TO ALL COUNTS

8. DRK is the owner and exclusive copyright holder of the attached photographic images ("Photographs") depicted in Exhibit A, whose registration status with the United States Copyright Office is set forth in that exhibit.

1 9. Between 1992 and 2009, DRK sold Pearson limited licenses to use copies
2 of the Photographs in numerous educational publications. The licenses DRK granted
3 Pearson were expressly limited by number of copies, distribution area, language, duration
4 and/or media as set forth in Exhibit A.

5 10. DRK granted the limited use licenses in response to Pearson's
6 representations to DRK that the use of the Photographs would not exceed the limitations
7 contained in its license requests. *See*, for example, Exhibits B-F, which set forth the
8 identity of the persons making the misrepresentations; the time, place and content of the
9 misrepresentations; and the method by which the misrepresentations were communicated
10 to DRK.

11 A. Pearson sought and secured a license to use DRK images in
12 *Essential Biology with Physiology*, limited to 40,000 copies and North American
13 distribution. Without notice to or permission from DRK, Pearson printed at least 81,000
14 copies and created an international edition and distributed it overseas. Exhibit B.

15 B. Pearson sought and secured a license to use DRK images in
16 *Biological Science, Second Edition*, limited to 40,000 copies. Without notice to or
17 permission from DRK, Pearson printed at least 83,900 copies. Exhibit C.

18 C. Pearson sought and secured a license to use DRK images in *Biology:*
19 *A Guide to the Natural World, Third Edition*, limited to 40,000 copies. Without notice to
20 or permission from DRK, Pearson printed at least 67,000 copies. Exhibit D.

21 D. Pearson sought and secured a license to use DRK images in *Earth*
22 *Science, Eleventh Edition*, limited to North American distribution. Without notice to or
23 permission from DRK, Pearson created an international edition and distributed it
24 overseas. Exhibit E.

25 E. Pearson sought and secured a license to use DRK images in
26 *Essentials of Geology, Tenth Edition*, limited to North American distribution. Without

1 notice to or permission from DRK, Pearson created an international edition and
2 distributed it overseas. Exhibit F.

3 11. At the time Pearson represented to DRK in its license requests that it
4 needed specified, limited licenses to use the Photographs, Pearson often knew its actual
5 uses under the licenses would exceed the permissions it was requesting and paying for.

6 12. Pearson intended by its misrepresentations to obtain access to the
7 Photographs at a lower cost than it would have paid had it been honest in its dealings
8 with DRK, and to conceal the copyright infringements that followed. Pearson's false and
9 misleading representations deceived DRK and concealed the copyright infringements that
10 followed.

11 13. DRK relied to its detriment on the truthfulness of the express limitations
12 contained in Pearson's license requests in establishing DRK's license fees.

13 14. When Pearson copied, distributed and used the Photographs without
14 authorization, Pearson had a duty in equity and good conscience to disclose those uses to
15 DRK. This is especially so because Pearson knew precisely when its use of the
16 Photographs exceeded the applicable license limitations, or were used without any
17 license, but DRK had no such knowledge nor any reason to assume Pearson was being
18 deceitful in the uses it was making of the Photographs. Pearson never disclosed its
19 unauthorized uses to DRK.

20 15. Pearson's fraud was effective and worked as intended. For years the
21 infringements that followed Pearson's fraud were concealed. But for DRK's fortuitous
22 discovery of Pearson's fraudulent acts, Pearson's infringing acts would still be concealed,
23 as Pearson intended.

24 16. Pearson alone knows the full extent to which it has infringed DRK
25 copyrights by violating DRK license limits.
26

1 17. On numerous occasions, Pearson requested licenses from DRK for
2 Pearson's re-use of DRK Photographs in later editions of books for which DRK had
3 granted limited licenses for earlier editions of the same books. On receipt of such
4 requests, DRK responded by asking Pearson for print run totals for the various editions of
5 the books. Pearson did not provide the requested information. The following are
6 examples.

7 A. Michelina Viscusi, an Image Permission Coordinator with Pearson,
8 sent a "Billing Request – Initial Letter" to DRK dated October 9, 2008, requesting
9 licenses for the re-use of four DRK Photographs in the eighth edition of a book entitled
10 *Biology* by Campbell and Reece. By e-mail message dated April 13, 2009, DRK asked
11 Ms. Viscusi, "Could you please tell me how many copies of this title have been printed to
12 date?" Pearson did not provide the requested information. Exhibit G-1.

13 B. On February 24, 2009, DRK received an e-mail message from
14 Debbie Latronica, an Image Permission Coordinator with Pearson, along with a license
15 request to re-use a DRK Photograph in the seventh edition of a book entitled *Organic*
16 *Chemistry* by Wade. On April 14, 2009, DRK e-mailed a message to Ms. Latronica
17 inquiring:

18 For the Organic Chemistry (by Wade) title we had images in
19 editions **four, five, six,** and now this request for edition
20 **seven.**

21 What I need to know is the print run total for each of these
22 editions.

23 (Boldface in original.) Pearson did not provide the requested information. Exhibit G-2.

24 C. On March 2, 2009, DRK received an e-mail message from Silvana
25 Attanasio, an Image Permission Coordinator with Pearson, along with two separate
26 license requests to re-use DRK Photographs in the second edition of a book entitled *How*
Does the Earth Work: Physical Geology and the Process of Science by Smith and Pun.

1 On April 14, 2009, DRK e-mailed a message to Ms. Attanasio inquiring as to how many
2 copies of the first edition were printed and how many copies of the second edition had
3 been printed. Pearson did not provide the requested information. Exhibit G-3.

4 D. On April 22, 2009, DRK received an e-mail message from
5 Michelina Viscusi, an Image Permission Coordinator with Pearson, along with eight
6 separate license requests to re-use DRK Photographs in the seventh edition of a book
7 entitled *Elements of Ecology* by Smith and Smith. By e-mail message dated April 22,
8 2009, DRK asked Ms. Viscusi:

9 Thank you for emailing eight (8) individual licensing requests
10 for Elements of Ecology, 7th edition, by Smith & Smith.

11 To properly consider these licensing requests we do need
12 some additional information; that information includes:

13 1.) the total number of copies printed of the © 2003 Addison
14 Wesley, 5th edition.

15 2.) the total number of copies printed of the © 2006 Benjamin
16 Cummings, 6th edition.

17 3.) the total number of copies produced of the © 2006
18 Benjamin Cummings, 6th edition, IRCD CD-ROM.

19 Thank you; I look forward to receiving this information from
20 you so we can further consider these licensing requests.

21 Pearson did not provide the requested information. Exhibit G-4.

22 18. On April 15, 2009, Julie Orr, Pearson's Curriculum Group's Image
23 Manager, Rights and Permissions, authored an email stating, "Do not use images from
24 Norbert Wu or DRK Photos. I'll explain later – I'm off to a meeting. You must find
25 something else, sorry!" Exhibit H. Pearson wanted to avoid using DRK because it made
26 inquiries that, if honestly answered, would have revealed Pearson's widespread copyright
infringements.

1 19. On May 3, 2010 and January 13, 2011, Julie Orr testified that Pearson
2 published photographs in its textbooks in some instances without obtaining any
3 permission, and had printed in excess of license limits in situations where licenses were
4 obtained. Exhibit I-1, I-2.

5 20. On June 16, 2010, Maureen Griffin, Pearson's Curriculum Group's Photo
6 Commissions Editor, testified that Pearson published photographs in its textbooks
7 "before the FTP [file to printer] date" and that "the number of textbooks printed exceeded
8 the licenses we obtained." Exhibit J.

9 21. On April 1, 2011, DRK's counsel requested that Pearson provide DRK with
10 information regarding Pearson's unauthorized uses of DRK Photographs. On April 11,
11 2011, DRK's counsel mailed Pearson a dvd detailing DRK's claims and requested that
12 Pearson let him know if there were any claims Pearson contended should be excluded
13 because no infringing use was made of DRK Photographs. Exhibit K. Pearson has not
14 provided the requested information.

15 22. Upon information and belief, Pearson exceeded the permitted uses under
16 the terms of the limited licenses identified in Exhibit A.

17 23. Upon information and belief, Pearson used the Photographs without *any*
18 license or permission in additional publications. Because Pearson alone knows these
19 wholly unauthorized uses, DRK cannot further identify them without discovery. Upon
20 information and belief, Pearson has developed a list of its wholly unlicensed uses
21 (euphemistically referred to by Pearson as images that need to be "cleared") and DRK's
22 Photographs are among those Pearson has so identified.

23 24. Pearson's practice of requesting and paying for a license for limited uses,
24 and then exceeding those licensed uses, extends far beyond the publications in Exhibits
25 B-F. *See* Exhibit L for additional examples. While the lost licensing fee to any
26 individual copyright holder is relatively small, Pearson has sold and distributed millions

1 of these publications, generating billions in revenue and profits. Pearson's business
2 model, built on a foundation of pervasive copyright infringement and fraud, deprived
3 DRK and thousands of other visual art licensors of their rightful compensation and
4 unjustly enriched Pearson with outlandish profits in the process.

5 25. DRK has satisfied, or Defendants have waived, all conditions precedent to
6 the filing of this Complaint. On some DRK invoices and on its website, DRK agreed to
7 forgo its right to sue if a licensee agreed to pay 10 times the maximum price (invoice
8 language) or 10 times the normal price (website language) for unauthorized uses, within
9 10 days of billing. Accordingly, on April 1, 2011, DRK offered to settle all copyright
10 infringement and contract claims pertaining to images licensed on and after June 17,
11 2003, for 10 times the maximum price it would have charged for the unauthorized uses
12 made, except for those licenses secured by Pearson through DRK Photo's website. For
13 website-issued licenses, DRK offered to settle all copyright infringement and contract
14 claims for 10 times the normal price it would have charged for the unauthorized uses
15 made. The offer provided that it would expire in 10 days and was contingent on
16 Pearson's agreement to disclose within a reasonable time its unauthorized uses and pay
17 DRK within 10 days of receipt of DRK's billing for such unauthorized uses. Pearson did
18 not accept DRK's offer.

19 26. Pearson seeks to avoid liability for its widespread copyright infringements
20 by this commit-the-perfect-crime approach:

21 A. license for unrealistically low limits, giving Pearson access to the
22 images and concealing its infringements because DRK doesn't know if and when Pearson
23 violates any particular license's limits,

24 B. use beyond those limits without notice to DRK,

25 C. refuse to disclose its unauthorized uses when requested, and

26 D. argue in court that infringement claims must be dismissed because:

1 (1) a condition precedent — DRK’s presentation of an itemized
2 billing for unauthorized uses which Pearson has prevented by refusing to disclose its uses
3 — has not been satisfied; and

4 (2) claims pleaded “on information and belief” (because Pearson,
5 the sole source of information about its infringing uses, refuses to disclose its uses) are
6 not supported by any evidence and DRK is merely on a “fishing expedition.”

7 27. Upon information and belief, John Doe Printers 1-10 are the printers of the
8 publications in suit, printed copies in excess of the licenses granted by DRK, and earned
9 profits from such printings.

10 28. All exhibits attached hereto are incorporated into this Complaint by this
11 reference.

12 **COUNT I**

13 **COPYRIGHT INFRINGEMENT AGAINST PEARSON**

14 29. DRK incorporates herein by this reference each and every allegation
15 contained in each paragraph above.

16 30. The foregoing acts of Pearson constitute infringements of DRK’s
17 copyrights in the Photographs in violation of 17 U.S.C. § 501 *et seq.*

18 31. DRK suffered damages as a result of Pearson’s unauthorized use of the
19 Photographs.

20 **COUNT II**

21 **FRAUD AGAINST PEARSON**

22 32. DRK incorporates herein by this reference each and every allegation
23 contained in each paragraph above.

24 33. The foregoing acts of Pearson constitute common-law fraud with respect to
25 the photographs identified in Exhibit B-F.

26 34. DRK suffered damages as a result of Pearson’s fraud.

COUNT III

COPYRIGHT INFRINGEMENT AGAINST JOHN DOE PRINTERS 1-10

35. DRK incorporates herein by this reference each and every allegation contained in each paragraph above.

36. The foregoing acts of John Doe Printers 1-10 in printing the publications in suit constitute infringements of DRK's copyrights in the Photographs, in violation of 17 U.S.C. §§ 501 *et. seq.*

37. DRK suffered damages as a result of the unauthorized printing of its Photographs by John Doe Printers 1-10.

WHEREFORE, DRK requests the following:

1. A preliminary and permanent injunction against Defendants and anyone working in concert with them from copying, displaying, distributing, selling or offering to sell DRK Photographs described in this Complaint and DRK photographs not included in suit.

2. As permitted under 17 U.S.C. § 503, impoundment of all copies of DRK Photographs used in violation of DRK's copyrights as well as all related records and documents and, at final judgment, destruction or other reasonable disposition of the unlawfully used Photographs, including digital files and any other means by which they could be used again by Defendants without DRK's authorization.

3. An award of DRK's actual damages and all profits derived from the unauthorized use of DRK Photographs or, where applicable and at DRK's election, statutory damages.

4. An award of punitive or exemplary damages against Pearson.

5. An award of DRK's reasonable attorneys' fees.

6. An award of DRK's court costs, expert witness fees, interest and all other amounts authorized under law.

1 7. Such other and further relief as the Court deems just and proper.

2 **JURY TRIAL DEMAND**

3 DRK demands a trial by jury of all issues permitted by law.

4 Dated: June 27, 2011

6 Plaintiff DRK Photo

7 By its attorneys,

8 s/ Christopher Seidman

9 Christopher Seidman (CS-7816)

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